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Case No. 84-1288

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK, and WILLIAM GRUZINSKI,

Petitioners,

vs.

JEFF D., PAULA E., JOHN M, and DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,

Respondents.

ON WRIT OF CERTIORARI FROM
THE UNITED STATES SUPREME COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. ADDITIONAL STATEMENT OF FACTS OF CASE

The State of Idaho established a pattern and practice in the 1970's of placing mentally ill children, as young as age eleven, with adult mental patients (including child molesters) with absolutely no specialized treatment or education services whatsoever. This was unconstitutional and violative of several statutes as discussed by Petitioners on page 5 of their brief.

After the filing of this litigation, the Idaho State Department of Education, by and through defendant Jerry Evans, immediately entered into meaningful settlement negotiations which resulted in a stipulation settling the education claims. In this stipulation the Department of Education agreed to provide to the plaintiff class the education services required by federal and state law. Attorneys' fees were not asserted at that time against the Department of Education because of the good faith shown by them in immediately providing the required educational services.

However, the Idaho State Department of Health and Welfare, including the Petitioners herein, did not join in this settlement. Rather, significant further litigation, discovery, depositions and other pre-trial proceedings were required prior to the time of reaching the negotiated settlement of the claims against Petitioners. The attorneys' fees were thereby significantly increased.

Approximately one week prior to trial the Petitioners drafted and offered the stipulation settling mental health claims and order which is attached as an appendix to the Petitioners' brief. The Respondents, deeming it clearly in the best interest of the class plaintiffs, were ethically bound to accept the settlement; as acknowledged by Petitioners on page 5 of their brief. However, the Respondents' counsel believed it was improper for the settlement to be conditional on the waiver of attorneys' fees. Therefore, the parties stipulated that each party would bear their own attorneys' fees and costs thus far incurred, "if so approved by the court." (Appendix to Petition, page 10a).

There is nothing in the record to support Petitioners' contention that there was a separate stipulation "that the settlement was to be tendered to the District Court for approval only if it concluded that the practice [of requiring a waiver of fees as a condition of settlement] was ethical." (See Petition, pages 6, 8 and 9.) The record does reflect that the merits of this case were settled regardless of what subsequently transpired; and that the attorneys' fees would be deemed waived by Respondents only "if so approved by the court."

Subsequent to this time, the Petitioners have consistently and systematically attempted to avoid the effects of the merits of the stipulation settling mental health claims and

order through several procedures. These have included attempting to stay the effects of that motion in the District Court, and in the Court of Appeals, and most recently by attempting to redefine the class in the District Court. The Petitioners have also refused to respond to discovery requests regarding compliance during the time of the appeal in this matter and are believed to be out of compliance with the stipulation. The Court of Appeals has overturned Petitioners' attempts to avoid compliance with the merits of the stipulation settling mental health claims and order. (See Appendix to petition, page 28a.)

II. QUESTION PRESENTED FOR REVIEW.

The question in this case is whether this Court should review a decision overruling a Federal District Court's approved settlement of a civil rights class action for declaratory and injunctive relief conditioned upon a waiver of plaintiffs' costs and attorneys' fees under 42 U.S.C. § 1988?

III. LEGAL ARGUMENT

A. The Ninth Circuit Decision Was Correct.

Respondents contend that this question has been answered correctly by the Court of Appeals in Jeff D. vs. Evans, 743 F.2d 648 (9th Cir. 1984). Respondents' would further refer the Court to Respondents' Brief on Appeal attached hereto as Exhibit "A";

this discusses fully the issue, the purposes of the Attorneys' Fees Act (42 U.S.C. § 1988) and the law at the heart of this appeal, should the Court desire to review the same.

Contrary to the contention of Petitioners, the Court of Appeals did clearly, adequately and fully address the question of whether the right to request attorneys' fees could be waived. Any reasonable reading of that court's decision will indicate that, in each case where a defendant is able to condition a settlement on the merits upon a waiver of attorneys' fees and costs, the practice is condemned because of the inherent ethical conflict which face plaintiffs and their counsel in such actions.

The District Court below failed to exercise its obligation under Federal Rule of Civil Procedure (FRCP) 23(e) to review and approve the terms of the settlement for fairness and reasonableness on the attorneys' fees issue. Clearly, under FRCP 23 a major factor in approval of such settlements is the benefit due the class (and their counsel). The Respondents' rule, if adopted, would deprive the District Courts of their mandate under FRCP 23(e) to approve such settlements; with the result of potential over-reching and conflicts FRCP 23(e) is designed to prevent.

The Petitioners first state that the Court of Appeals framed the question to be decided as follows: "whether the court, in reviewing a class action settlement in a civil rights action,

properly approved the waiver of fees simply because it was part of the settlement to which the parties had agreed?" (See page 6 of Respondents Brief.) However, the "Stipulation Settling Mental Health Claims and Order" approves the settlement of this class action and the waiver of costs and attorneys' fees only if so approved by the court. Clearly, the parties contemplated a settlement on the merits, with the waiver of attorneys' fees contingent on the court's approval.

Thus, Carson v. American Brands, 450 U.S. 79 (1981), which recognizes the right of the parties in an employment discrimination action (42 U.S.C. § 2000) for money damages to compromise their dispute on mutually agreeable terms, is inapplicable. In Carson, this Court held that only a District Court's decision to enter a proposed stipulation was an appealable order.

In this case, the parties have compromised and settled their dispute on mutually agreeable terms; one of the terms of that settlement, drafted by Petitioners, was that the District Court would decide whether the waiver of attorneys' fees as a condition of settlement was proper. The District Court held that such practice was proper but the Appellate Court disagreed. However, the parties had stipulated to be bound by the decision of the court on the fees issue only; the merits had been settled.

Further, in White vs. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), this Court was confronted with a motion for attorneys' fees made over four months after a consent decree was entered in a civil rights action. This Court found that "the court's decision of entitlement to fees will therefore require an inquiry separate from the merits" and remanded the attorneys' fees petition for consideration by the Court. However, the Court recognized the obvious result that where a party had made a surprise post-judgment motion for attorneys' fees the cases would "support a denial of fees in cases in which a post-judgment motion unfairly surprises or prejudices the affected party."

That is clearly not the case in the instant situation. The Respondents had stipulated to waive costs and attorneys' fees only if so ordered by the court. The parties stipulated and agreed that this issue would be presented to the court for a decision under the express terms of the stipulation. There can be no claim that such motion made in this case "unfairly surprises or prejudices" the Petitioners.

Similarly, Newman vs. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) is also irrelevant; in that case this Court held an award of fees entirely proper in circumstances similar to those at bar. The Ninth Circuit Court of Appeals in this case has held that the award of attorneys' fees was not unjust; but, in fact, was just.

Moreover, no party has been "mislead" in this matter as was present in Chicano Police Officer's Association v. Stover, 624 F.2d 127 (10th Cir. 1980). Rather, all the parties negotiated and settled the case with the expectation that the court would decide the attorneys' fees issues. Simply because the Respondents sought to have a redetermination of that issue by the Ninth Circuit Court of Appeals, which they felt was wrongly decided by the District Court, the Petitioners feel constrained to call the settlement unjust, unfair and prejudicial and "return to the bargaining table on the merits." Such a result was one that was clearly not contemplated by the parties, not in the best interest of the plaintiff class, and detrimental to the interests of justice in general. The court must not approve such a result.

The issue in this case has been indirectly decided by this Court in Hensley v. Eckerhart, ___ U.S. ___, 76 L.Ed.2d 40 (1983), in which the court held that the District Courts have the discretion to award attorneys' fees under 42 U.S.C. § 1988. However, the Court of Appeals did not remand the instant case for a determination as to whether Respondents are prevailing parties because they made that determination based on the clear evidence in this matter. This should be beyond dispute, especially in light of the Petitioners' consistent and systematic attempts, even in this Court, to return once again to the merits of the litigation which was previously and expressly settled. Why, if

the Petitioners had prevailed, would the Petitioners be so intent on relitigating or renegotiating the merits of this matter? It is clear that the Petitioners were guilty of a denial of fundamental constitutional rights of the plaintiff class and the Respondents prevailed in obtaining substantial, albeit as yet unrealized, relief from these practices.

B. Decisions Below Do Not Conflict.

The Petitioner's other cited decisions of Young v. Powell, 729 F.2d 563 (8th Cir. 1984); and Jennings vs. Metropolitan Gov. of Nashville, 715 F.2d 1111 (6th Cir. 1983), were both actions that were settled individually (not as class actions) and dismissed with prejudice without addressing attorneys' fees. The courts recognized that a dismissal with prejudice of an individual action probably precludes a subsequent award of attorneys' fees.

Different facts are present in this case. The Respondents prevailed on the substance of their claims in the District Court, as the Court of Appeals found. Hence, the cases of Young and Jennings (supra) are inapplicable to the instant situation, especially since these were not class actions.

Moreover, Chicano Police Officer's Association vs. Stover, 624 F.2d 127 (10th Cir. 1980), does not apply to this situation. In that situation there was a settlement of an individual (not class action) lawsuit for $16,000.00 in cash

which did not mention attorneys' fees at all. In this case attorneys' fees were specifically mentioned and discussed and ordered waived only if the Court so approved. Hence, such fees were clearly not included as part of the judgment, and the defendants were not misled nor are there any otner special circumstances warranting reversal of the decision of the Ninth Circuit Court of Appeals.

IV. CONCLUSION

The parties in this case have clearly and concisely stipulated to resolve their claims on the merits in the Stipulation Settling Mental Health Claims and Order. The decision as to the propriety of the forced waiver of Responcents' attorneys' fees was, by stipulation of the parties, left to be decided by the Court. The Court approved such waiver of attorneys' fees, and the Ninth Circuit Court of Appeals reversed for the reasons outlined in their decision.

As the Petitioners themselves indicate, this is not a case presenting questions of fraud, mistake, or excusable neglect authorizing amendment to the court approved settlement. Similarly, this is not a case in which the negotiations included overreaching or any improper negotiating practices. The negotiations in this case included open discussion and bargaining on all the issues. All issues, including the decision to submit

the decision on the waiver of costs and attorneys' fees to the court, were agreed to by the parties.

Petitioners have cited no class action civil rights settlement decision in conflict with that of the Ninth Circuit below. In fact, the only two decisions on point, White v. New Hampshire (supra) and Hensley vs. Eckerhart (supra) both support Respondents.

Reversal of the Ninth Circuit would mean that a District Court has no duty to independently review class action settlements for fairness. Rather, the issue would be left to the parties with forseeable harmful consequences.

This case presents no novel, or disputed question for this Court. Rather, it presents the rather common-place issue of an over-worked District Court's erroneous approval of one provision of a class action settlement which was fortunately corrected on appeal.

This class action would probably never have been brought without the attorneys' fees provision of 42 U.S.C. § 1988. As the Petitioners indicate, most of these civil rights actions are settled short of trial. To allow a forced waiver of attorneys' fees as a condition of settlement will result in a chilling effect on similar civil rights actions in the future. The indigent and those not financially able to afford counsel will be left to the whim and caprice of the state or others who may seek

to deny fundamental rights. Instead of using declaratory/injunctive relief actions, litigants may be forced to claim money damages (where possibly inappropriate) to generate funds to litigate such issues.

Respondents request the Court deny the Petition For Writ of Certiorari, not just for these plaintiffs, but for plaintiffs who may in the future desire to enforce the minimal civil rights of the extremely destitute. The decision of the Ninth Circuit should be left to stand as a bench-mark for future litigants in these areas, and the law allowed to develop. To grant the writ of Certiorari, and review the decision of the Ninth Circuit, will condemn the Respondents and other similarly situated to a world in which their ability to obtain counsel will be restricted, and in many cases, eliminated.

The Court must not allow this to happen. Rather, since Petitioners have presented nothing new, that could not have been presented below, Certiorari should be denied and the decision below left intact.

WHEREFORE, the Respondents pray that the Writ of Certiorari prayed for in this matter be denied.

RESPECTFULLY SUBMITTED.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing, by placing same in the United States mail, postage prepaid, addressed as follows:

James Wickham, Esquire
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James Thomas Jones
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on this 25 day of March, 1985.

Licensed Lawyer

EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, Plaintiffs/Appellants, vs. JOHN V. EVANS, MILTON G. KLEIN, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities. Their Successors to Office, Title and Interest, Defendants/Appellees.	Ninth Cir. No. 83-3639 Dist. Case No. CIV 80-4091 APPELLANT'S BRIEF

Appeal from the United States District Court
District of Idaho
Honorable Marion J. Callister
(80-4091)

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UNITED STATES COURT OF APPEALS

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The undersigned, counsel of record for Appellants certifies that the following listed parties have an interest in the outcome of this case: the named and Class Plaintiffs; Idaho Legal Aid Services; Charles Johnson, Johnson Olson Robison, Chartered; The State of Idahn. These representations are made to enable judges of the Court to evaluate possible disqualification or recusal.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, Plaintiffs/Appellants, vs. JOHN V. EVANS, MILTON G. KLEIN, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities. Their Successors to Office, Title and Interest, Defendants/Appellees.	Ninth Cir. No. 83-3639 Dist. Case No. CIV 80-4091 CERTIFICATION REQUIRED BY NINTH CIRCUIT COURT OF APPEALS RULE 13(b) (3)

The undersigned, counsel of record for Appellants certifies that the following listed parties have an interest in the outcome of this case: the named and Class Plaintiffs; Idaho Legal Aid Services; Charles Johnson, Johnson Olson Robison, Chartered; The State of Idaho. These representations are made to enable judges of the Court to evaluate possible disqualification or recusal.

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II. STATEMENT OF THE CASE; NATURE OF THE CASE, COURSE OF PROCEEDINGS BELOW; and FACTS.

A. JURISDICTION AND TIMELINESS LOCAL RULE 13(b) STATEMENT

The basis for subject matter jurisdiction was grounded on federal questions both under 28 USC §1331, as arising "under the Constitution, laws, or treaties of the United States," and 28 USC §1343, civil rights; and, in relation to the federal question the doctrine of pendent jurisdiction was relied on as to state law counts. Defendents have referred to the "First, Fifth and Fourteenth Amendments to the Constitution of the United States of America" as well as 42 USC §§1983 and 1988.

The appeal was timely filed.

The Order is properly appealable. The Order and Judgment appealed from finally disposed of all attorney fee claims with respect to all parties.

Judgement denying attorney fees was entered May 6, 1983. The Notice of Appeal was filed within thirty days, having been filed on May 23, 1983.

No attorneys fees were awarded to any party below, and are sought by plaintiff on appeal.

B. Nature of the Case

This action challenged the placement by the defendant State of Idaho of emotionally disabled children of both sexes

(as young as age 11), on the same units as adult psychiatric patients, including child molesters. Further, the total failure to provice any appropriate specialized treatment, the failure to provide any education at all (special or otherwise), and the failure to provide specialized staff and other services for said children in the setting least restrictive of personal liberty was challenged.

The parties to this matter, by and through their respective counsel, have engaged in years of trial preparation, work and negotiation, which is on file with the Court. The defendants proposed a "Stipulation Settling Mental Health Claims and Order" (stipulation, hereinafter) at a pre-trial conference one week prior to trial, which stipulation is on file with the Court.

The parties stipulated to the entry of the declaration of the basic rights the plaintiffs prayed for in their complaint. Further, the stipulation provides minimally acrquate protection, training and mental health treatment for the plaintiff class. The stipulation is a dramatic improvement over past practices and is designed to prevent the problems complained of herein from re-occurring.

C. Courts of Reconsideration Below

The defendants proposed the stipulation with the provision that Plaintiffs were forced to waive their costs and

attorney fees; which plaintiffs found unacceptable on ethical grounds. Hence, by interlineation, the parties stipulated, at the settlement hearing in this matter (held in Pocatello, on March 22, 1983), to a change in paragraph II (25) of the stipulation, as follows:

> 25. Plaintiffs and defendants shall each bear their own costs and attorneys fees thus far incurred, if so approved by the Court. (The change agreed to by counsel has been highlighted. See Transcript page 6.)

The reason for this change is that counsel for plaintiffs maintained that any discussion of costs and attorney fees (collectively costs hereinafter) was unethical and improper. Hence, the stipulation was approved on the merits, while withholding for future consideration the matter of costs.

Counsel for the parties agreed at the hearing that the matter of the propriety (and ethics) of negotiating the merits and costs simultaneously should be addressed by the Court. The defendant's counsel then stated that he would tender the Stipulation, conditional on the Court's approval of this cost's issue. Counsel for the defendants then stated that if the negotiation of costs and merits simultaneously is proper, that the settlement should stand.

The plaintiff's subsequently filed a Motion for Consideration of Costs and Attorneys Fees on Settlement, which

advocated approval of the settlement with no provision on the waiver of attorney fees, so that plaintiffs could present their cost bill with (attorney fees) for consideration by the Court. The defendants filed a Brief advocating approval of the "Stipulation Settling Mental Health Claims and Order", with waiver of all attorney fees and costs.

The Federal District Court in Idaho approved the "Stipulation Settling Mental Health Claims and Order" on or about April 28, 1983. Subsequently, on May 6, 1983, the Court issued an "Order Denying all Costs" in this matter.

The plaintiffs filed a Notice of Appeal from the Order Denying All Costs on May 23, 1983. The appeal of the Order Denying all Costs is presently pending before this Court.

On May 31, 1983, the defendants filed a "Motion to Suspend Performance of Stipulation Pending Appeal". This document listed no rules upon which the "Motion to Suspend Performance of Stipulation Pending Appeal" was based. Moreover, the only grounds for the motion are that the defendants seek to preserve the bargaining position of the parties on the waiver of attorney fees.

The Federal District Court of Idaho granted the "Motion to Suspend Performance of Stipulation Pending Appeal" by Order dated August 10, 1983. Plaintiffs then filed a "Motion for Relief from the Stay" created by the "Motion to

Suspend Performance of Stipulation Pending Appeal" on or about August 26, 1983. This was denied by the District Court.

The plaintiffs then moved for relief in this court. This Court then entered an order granting Appellant's Motion for Stay or Injunction Pending Appeal and ordered the parties to comply with the stipulation.

The court should note that four children have been placed with adults in Idaho facilities since the entry of the Stipulation. These youth allegedly are placed in compliance with the Stipulation for a variety of reasons, but the situation must be monitored.

A named plaintiff and primary witness in this case, Paula E., who resided at State Hospital South for seven years (from about age 13 to age 20) was released in June, 1983, by defendants and placed at the "Y Motel" in Blackfoot, Idaho (an allegedly inappropriate placement). Three weeks later she was dead; runover by a car.

These harms were lessened or prevented by this Court's enforcement of the "Stipulation Settling Mental Health Claims and Order". Indeed, enforcement of the Stipulation is critical to class plaintiffs.

This case was originally litigated by counsel for the plaintiff under a special advocacy grant from the National Institute of Mental Health to Idaho Legal Aid. That grant has

since expired, and counsel for plaintiffs has endeavored to litigate this matter in private practice, with some assistance from Idaho Legal Aid.

III. ISSUES PRESENTED

There are two major issues in this case.

First, whether it is improper for defense counsel to raise the issue of, and require, the waiver of costs and attorney fees as part of a final settlement on the merits of a class action for declaratory and injunctive relief.

The second issue on appeal is whether plaintiffs are entitled to costs, including a reasonable attorney fee, in this action pursuant to federal law including 42 U.S.C. §1988.

IV. ARGUMENT

A. AUTHORITY FOR ATTORNEY FEES

The statutory authority for an award of attorney fees in this matter is found in the civil rights statute, 42 U.S.C. §1988. This statute provides that in any civil action or proceeding to enforce the civil rights statutes or the U.S. Constitution, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs." The plaintiffs specifically prayed for such costs and attorney fees in their complaint.

Support for plaintiffs position can be easily found in

the legislative history of the act (42 U.S.C. §1988) in which Congress emphasized that "[t]he remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven."[1/] Congress specially recognized that attorneys' fee awards to private litigants was one of the "most effective remedies available to achieve the goals of our civil rights laws." [2/] Furthermore, Congress stated that: "if our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases."[3/] To the extent that the negotiation of costs and merits force plaintiffs and their counsel to involuntarily waive their right to fee awards, such conduct violates the spirit and letter of the act.

The Act further reflects Congress' intent to effectuate and encourage private enforcement of the civil rights laws by authorizing the awarding of attorney fees to prevailing parties in civil rights actions.

1/ S. REP. NO. 94-1011, 94th Cong., 2d Sess., reprinted in [1976] U.S. CODE CONG. & AD NEWS 5910.

2/ ID at 5911

3/ ID at 5913

"The purpose and effect of S. 2278 are simple--it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866...All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."

"Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose.***Without counsel fees the grant of Federal jurisdiction is but an empty gesture***. Hall v. Cole, 412 U.S. 1 (1973, quoting 462 F.2d 777, 780-81 (2d Cir. 1972)." Senate Report 94-1011, 5 U.S. Code Cong. and Admin. News at 5909-10 (1976).

Congress was particularly concerned with the plight of persons financially unable to vindicate violations of their constitutional rights.

"In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." Senate Report 94-1011, supra at 5910. (Emphasis added)

* * *

These fee shifting provisions have been successful in enabling vigorous enforcement

> of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy.

As the Ninth Circuit recently commented, in Dennis v. Chang, 611 F.2d 1302, 1308 (9th Cir. 1980), affirming a fee award of fees to the Legal Aid Society of Hawaii ("LASH") in four cases successfully challenging the administration of Hawaii's Medicaid and AFDC programs:

> Even when funded by the State, legal services organizations operate on limited budgets and must allocate their resources among competing projects. Fee awards in civil rights cases encourage legal services organizations to pursue such litigation because the awards permit replenishment of the funds available for the organization's work. While LASH has a present program commitment to civil rights litigation, that commitment is not immutable. Continuation of the commitment is made more attractive by the prospect of recouping resources devoted to such suits. Moreover, attorneys' fees awards will allow LASH to expand it efforts to enforce civil rights statutes in accordance with it commitment.

This result was affirmed in Leeds v. Watson, 630 F.2d 674, 677 (9th Cir. 1980).

It should be noted that all costs awarded to the Plaintiffs are paid directly to Idaho Legal Aid Services, Inc., and thereby enable it to replenish the limited funds which are available to the program to represent these same plaintiff/appellants in the implementation of this consent decree. See Dennis v. Chiang, supra.

More recently, the U.S. District Court in Massachusetts decided that a class of persons institutionalized in a state mental hospital has the right to independent legal assistance in order to ensure protection of their rights. Brewster v. Dukakis, (D.C. Mass., 1981) Civil Case No. 76-4423-F, 50 Law Week 2235 (10-20-81). Judge Freedman found that the state was required to fund this advocacy system based on three (3) considerations. First, if the state does not assume responsibility for this system, there will be none. Second, the cost is not great (though the judge sympathized with the state's fiscal problems). Third, such a system is a necessity for these individuals who will otherwise suffer chronic and substantial deprivations of their rights. Another case reached a similar result on the basis that plaintiffs were "prevailing parties" and entitled to attorney fees. Association for Retarded Citizens vs. State of Florida. (Jan.-Feb. Mental Disability Law Reporter) 7 M.D.L.R. 62.

Thus, an award of attorney fees will provide a common fund to protect plaintiff/appellants. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, (1939), Hall v. Cole, 412 U.S. 1, (1973). Thereby, compliance with the Court stipulation may be assured. Toledo Scale Co. vs. Computing Scale Co., 261 U.S. 399,

(1923)[4]

Therefore, an award of costs in general is proper, and in this situation, especially appropriate. Without adequate advocacy resources the plaintiffs may face a bleak future where they do little more than exist, with no specialized treatment, on adult psychiatric units with child molesters.

In this case, before Idaho Legal Aid obtained a special grant to litigate mental health issues, plaintiffs of both sexes as young as age 11 were placed with all other adult psychiatric patients in Idaho (including child molesters) without any education or specialized treatment. This case has been settled and this situation does not exist anymore.

However, the special grant to litigate these issues has been terminated. Counsel for the plaintiff class is now in private practice attempting to litigate these and other issues with partial assistance from Idaho Legal Aid. Obviously, the necessity of fees in this situation -- as evidenced by this brief -- is poignantly obvious.

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[4] Defendant's lack of good faith in prolonging the litigation and increasing plaintiffs costs in this matter may also be questioned. Vaughn v. Atkinson, 367 U.S. 527 (1962); Hutto v. Finney, 437 U.S. 678 (1978).

potential conflict disappears simply because there is no fund or money damages being negotiated. Financial consequences of injunctive relief are a significant consideration to the institution negotiating a remedy, and the potential conflict[5/] between class counsel and the members of the class remains.[6/]

Whether the existence of the potential conflict requires a trial court to reject a settlement proposal depends upon the circumstances of each case. The presence of simultaneously negotiated attorneys' fees should cause the court to examine with special scrutiny the benefits negotiated for the class. It would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiations took place. But rejection of a settlement is not automatically required in such cases -- there may be circumstances present which appear to neutralize the potential for impropriety. Such a judgment is appropriately within the sound discretion of the trial judge who can be sensitive to the dynamics of the situation. Thus, while we strongly discourage the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations, accord, Prandini,

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5/ We do acknowledge, however, that the danger of impropriety may not be as great here as when there is one fund from which both the class award and the attorneys' fees are to be apportioned. In such a case, where the defendant is indifferent as to the allocation, the conflict is more direct. These are appropriate circumstances for the District Court to take into account. (Footnote from text).

6/ We do not make any findings that there were in fact improprieties in the negotiation of this settlement. However, "[t]he court does have the duty to see to it that the administration of justice has the appearance of propriety as well as being so in fact." Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977). (Footnote from text)

557 F.2d at 1021, we do not believe rejection of a resulting settlement in every case is appropriate.

In Mendoza v. U.S., the court approved the settlement; which provided declaratory/injunctive relief and provided attorney fees, in spite of an allegation of an unfair compromise to some class plaintiffs on the merits. There is no allegation that the settlement is unfair to the plaintiffs in the instant case on the merits and so the settlement on the merits should be approved. However, there is a dispute on the improper forced waiver of attorney fees, which waiver should not be approved.

A similar result has been reached in another case approved by the ninth circuit. Norman v. McKee, 290 F. Supp. 29 (N.D. Cal. 1968), aff'd, 431 F.2d 767 (9th Cir. 1970). Cases from other jurisdictions have held that negotiations on the merits must be separate from negotiations on fees. Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977); Obin v. District Number Nine of I.A.M.A.W., 651 F.2d 574, 583 (8th Cir. 1980); Jamison v. Butcher and Sherrerd, 68 F.R.D. 479 (E.D. Pa. 1975); McDonald v. Chicago Milwaukee Corporation, 565 F.2d 416 (7th Cir. 1977).

The reasons for not permitting the simultaneous negotiation of the merits and fees is best summarized by the Opinion of the N.Y. City Bar Association, 50 Law Week 2204-2205. In its opinion, the Bar recognized that a forced waiver of attorney fees will place attorneys representing

indigent plaintiffs in declaratory/injunctive cases in an ethical conflict.

This conflict arises from defendants ability to propose a settlement which is clearly in the best interest of the class plaintiffs, which the attorney must ethicly accept. Under Disciplinary Rule Cannons 6 and 7, a lawyer must represent a client competently and zealously within the bounds of the law. Moreover, under Cannon 5, an attorney must exercise independant professional judgment on behalf of a client and must not acquire an interest in the litigation.

Yet attorneys, like all persons, must be paid for their services. If attorneys are not paid, these cases will not be litigated at all.

Thus, forced fee waiver will also defeat the purpose of attorney fee statutes and allow defendant's to exploit the plaintiffs conflict, to the defendant's advantage. The problem created by simultaneous settlement negotiations of the merits and attorneys' fees is the dilemma faced by plaintiffs' counsel in the lawyer's self-interest in maximizing the fee award as opposed to the duty to maximize the benefit for the client. Potential for the dilemma is created whenever defense lawyers offer a lump sum monetary settlement (plaintiff's damage or back pay claims, as well as attorneys' fees), or in connection with non-monetary relief where defense counsel conditions an

offer on the merits with an offer on fees. Obviously, the form and conditions of these settlement practices by defense counsel vary greatly. Where no money is involved, such offers create an insuperable dilemma for civil rights plaintiffs and their counsel by driving a wedge between them and creating a conflict of interest for plaintiffs' counsel.

In this case the wedge was dramatic and real; plaintiffs counsel was under clear instructions not to waive any fees which had been advanced by Idaho Legal Aid. The plaintiffs counsel was in the midst of trial preparations (briefing, issuing subpoenas, arranging accomodations for out of state experts, etc.) when, at the pre-trial conference, less than one week before trial, the defendant, State of Idaho, proposed a settlement that was not only clearly in the best interest of plaintiffs, but was better than the Federal District Judge in the case had implied he would have ordered. However, the settlement also required the forced waiver of all fees. Legal Aid would not yield, neither would the State. Plaintiff's counsel was placed in a severe ethical bind.

As a last effort, plaintiff's counsel proposed that the settlemet he approved with the fee waiver "if so ordered by the Court." In this way the plaintiff's counsel obtained the settlement on the merits, which he was ethically bound to accept, and which provided immediate relief without the

necessity of an appeal from a trial at which an uncertain factual record would have developed (incidently, saving costs of further preparation and trial costs). However, the propriety of the attorney fees waiver -- which plaintiff's counsel was contractually and ethicly bound not to accept - could be litigated later. If nothing else, this matter should be decided to obviate this dilemma for, and encourage, future would-be litigants in this area (of which there are few in Idaho).

C. PROCEDURE IN THIS CASE

1. Approval of the Settlement Without the Fee Waiver.

Recently many federal courts have held that a negotiated fee will not be automatically approved. The court will instead determine whether the fee is justified by applying the usual standards for setting a fee award. Prandini v. National Tea Co., supra, at 1018-19; Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975)(Merola II); Grunin v. International House of Pancakes, 513 F.2d 114, 128 (8th Cir. 1975); Merola v. Atlantic Richfield Co., 493 F.2d 292 (3d Cir. 1974)(Merola I); In re King Resources Co. Security Litigation, 420 F. Supp. 610, 628 (D. Colo. 1976).

This is reflected in Federal Rule of Civil Procedure 23 and its mandate that the federal district court approve of all compromises or dismissals of class actions. Under Rule

23(e), the court has very wide discretion to assure itself that all aspects of the settlement proposal are fair to the named and unnamed parties. Indeed the court's role under Rule 23(e) has been described as an "overseer" of the rights of unnamed passive members of the class. In re Armored Car Antitrust Litigation, 472 F. Supp. 1357, 1367 (N.D. Ga. 1979).

In any case, the settlement in this case on the merits should stand. Other than the waiver of attorney fees, the settlement in this case presents a fair compromise of a disputed claim. Mendoza v. United States, supra, at 1353.

This conclusion finds support in the Supreme Court's discussion of attorney's fees in White v. New Hampshire Dept. of Empl. Sec., 455 US 445, 71 L Ed 2d 325, 102 S Ct 1162 (1982). In this case, the Court considered the power of a court to award counsel fees under 42 U.S.C. §1988 pursuant to an application that had been filed several months after entry of a consent decree on the merits of the case. The district court had determined that the application was proper, but the circuit court held the application untimely under F.R.C.P. 59(e), which permitted amendment of a final decree only upon a motion filed within ten days of the time in which the decree was entered. The Supreme Court, however, squarely rejected this argument at 455 U.S. 454; and awarded attorney fees:

> Section 1988 authorizes the award of

> attorneys' fees "in [the] discretion" of the court. We believe that this discretion will support a denial of fees in cases in which a postjudgment motion unfairly surprises or prejudices the affected party. Moreover, the district courts remain free to adopt local rules establishing timeliness standards for the filing of claims for attorney's fees. And of course the district courts generally can avoid piecemeal appeals by promptly hearing and deciding claims for attorneys' fees. Such practice normally will permit appeals from fee awards to be considered together with any appeal from a final judgment on the merits.

Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed 1184 (1939). See also Obin v. Dist. No. 9 of Intern. Assn., etc., 651 F.2d 574, 582 (7th Cir. 1981), "motion for attorney fees collater and independant...from merits" of lawsuit.

2. The Settlement in this Case Warrants Attorney fees

A plaintiff who prevails at least in part on a substantive issue of some importance is entitled to fees. The Senate Report provided the clearest statement of the appropriate test:

> [Fee] awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without

formally obtaining relief.[7]

A plaintiff who prevails in part through settlement is entitled to fees under the law. Maher v. Gagne, 448 U.S. 122 (1980). In this case the Supreme Court affirmed the prevailing party status of a plaintiff who, "while not prevailing 'in every particular'" nonetheless obtained through a consent decree "'substantially all of the relief originally sought in her complaint'" 448 U.S. 129-130 The court, in Bradley v. Richmond School Board (1974) 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed. 2d 476, confronted a District Court which had awarded attorney fees in a school desegregation case to one whom, it was at least arguable, was not a "prevailing party" and where there was not a "final order" pending. The court, without dissent, said, at 416 U.S. 723:

> (These cases) can be expected to involve relief of an injunctive nature that must prove its efficacy only over a period of time and often with frequent modification ... To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel... A district court must have discretion to award attorney fees and costs incident to the final disposition of interim matters.

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7 S. Rep. No 94-1011, 94th Cong., 2d Sess., 5 (1976). See also H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976)

The Supreme Court has expressly held that a district court may make an award of costs, Id. at 724, of the kind contemplated herein.

This court adopted these principles in Leeds v. Watsen, supra, 630 F. 2d at 677: "Although the Act permits the court to exercise its discretion as to whether to award attorney fees, such fees should be awarded to a litigant who furthers the interest of a significant class of persons by effectuating congressional purposes of a high priority. (Citations ommitted). The successful plaintiff in this type of claim, then, should ordinarily be entitled to attorney fees unless special circumstances would render such an award unjust."

Three of the most often asserted special circumstances for denial of fees have been soundly rejected by the Supreme Court; neither a defendant's good faith,[8] the enactment of a new fee-shifting statute, [9] nor the free representation of a plaintiff by a public interest organization[10] constitutes a

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8 Hutto v. Finney, 437 U.S. 678 (1978). Similarly, an allegation by government defendants that they were duty-bound to defend a challenged statute is not a special circumstance. See, e.g., International Oceanic Enterprises, Inc. v. Preston, 614 F. 2d 502 (5th Cir. 1980), Johnson v. Mississippi, 606 F.2d 635 (5th Cir. 1979)

9 Hutto v. Finney, 437 U.S. 678 (1978)

10 New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980)

special circumstance which would render an award of fees unjust. Dozens of other alleged special circumstances have also been routinely rejected by the courts. For example, it is not a special circumstance

> that the litigation benefited only named plaintiffs or affected only private rights rather than a larger public or public rights; [11]
>
> that plaintiffs won minor damages or only nominal damages; [12]
>
> that plantiff's case was simple; [13]
>
> that the government entity held liable is not in the best financial condition or is running a deficit; [14]
>
> that the fees would be paid through tax revenues collected from current taxpayers rather than from former taxpayers who were around when the challenged law was enacted; [15] or

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11 Konczak v. Tyrrell, 603 F.2d 13 (7th Cir. 1979), cert. denied, 444 U.S. 1016 (1980); Perez v. University of Puerto Rico, 600 F.2d 1 (1st Cir 1979)

12 Coop v. South Bend, 635 F.2d 652 (7th Cir. 1980); Burt v. Abel, 585 F.2d 613 (4th Cir. 1978).

13 Staten v. Housing Auth. of Pittsburg, 638 F.2d 599 (3d Cir. 1980)

14 Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980); Sharrock v. Harris, 489 F. Supp. 913 (S.D.N.Y. 1980)

15 Aware Woman Clinic, Inc. v. Cocoa Beach, Florida, 629 F. 2d 1146 (5th Cir. 1980); Riddell v. National Democratic Party, 624 F.2d 539 (5th Cir. 1980).

> that a substantial portion of the fee request is for time spent on the fee issue itself.[16]

In view of the fact that so many defense arguments have now been rejected, some courts are summarily concluding in the cases before them that there simply are no special circumstances for denial of fees[17]. Other courts have recognized that, as a general matter, prevailing plaintiffs are entitled to fees "almost as a matter of course."[18] Leeds v. Watson, supra.

3. The direction for Amount of Attorney Fees on Remand

Regardless of the method of computation that is followed, there remain dozens of issues affecting compensable hours, reasonable hourly rates, the contingency factors, and the quality factors. Many of these issues were addressed in summary fashion in a single paragraph in the Senate Report:

> It is intended that the amount of fees awarded under [the Fees Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be

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16 Criterion Club of Albany v. Board of Comm'rs, 594 F.2d 118 (5th Cir. 1979).

17 See, e.g., Universal Amusement Co. v. Hofheinz, 616 F.2d 202, 205 (5th Cir. 1980).

18 Gates v. Collier, 616 F.2d 1268, 1275 (5th Cir. 1980); Davis v. Murphy, 587 F. 2d 362, 364, (7th Cir. 1978).

nonpecuniary in nature. The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenberg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." Davis, supra; Stanford Daily, supra, at 684. S. Rep. No. 94-1011, 94th Cong. 2d Sess., 6 (1976).

The standard for determing the proper amount of attorney fees to be awarded a prevailing party has been set forth in numerous court decisions. Hensley v. Eckerhart, ___ U.S. ___, 51 Law Week 4552 (5/17/83). See Dennis v. Chiang, supra. The Ninth Circuit Court of Appeals has adopted the twelve standards enunciated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Fountilla v. Carter, 571 F.2d 467, 496 (9th Cir. 1978); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

The court should remand this matter with directions to allow attorney fees under the standards in the above cases. This will prevent future litigation of this matter.

V. CONCLUSION

The defendants actions in this case placed children

with adult mental patients (including child molesters), without any specialized education or child psychiatric programs. This problem has been alleviated.

The defendant State of Idaho had already advocated vociferously for approval of this settlement on the merits. And, the defendant, State of Idaho, only sought to vacate the "Stipulation Settling Mental Health Claims" in order to force plaintiffs to waive their attorney fees in exchange for a settlement on the merits.

The purpose of the Attorney Fees Act (42 U.S.C. §1988) will only be served by an award of fees in this matter. Otherwise, the plaintiffs will be at the mercy of the defendants and subject to a return of past practices.

WHEREFORE, the plaintiffs move the above entitled Court to (1) approve and enforce the "Stipulation Settling Mental Health Claims and Order"; (2) grant plaintiff/-appellants their attorney fees and costs, in the District Court and on appeal.

DATED this 23 day of November, 1983

Charles Johnson, III
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STATEMENT OF RELATED CASES

There are no known related cases, other than issues treated in the Ninth Circuit cases cited in this brief.

Charles Johnson, III

CERTIFICATE OF MAILING

I CERTIFY that I mailed a true and correct copy of the foregoing to the attorney of record herein, by placing same in the United States mail, postage prepaid, addressed as follows:

James Wickham, Esquire
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Deputy Attorney General
Health and Welfare Division
450 W. State, 7th Floor
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on this ___ day of November, 1983.

Licensed Lawyer